SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1693

WILBERT JACKSON,

Petitioner,

—v.—

NEW YORK CITY TRANSIT AUTHORITY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

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No. .....

WILBERT JACKSON,

Petitioner,

—v.—

NEW YORK CITY TRANSIT AUTHORITY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

Petitioner prays that a writ of certiorari issue to review the judgment of the New York State Court of Appeals entered in this case on February 13, 1974.

Citations to Opinions Below

The order of the New York State Court of Appeals, not yet reported, appears in the Appendix. The order of the Appellate Division, reported at 41 A.D.2d 646, 340 N.Y.S.2d 609, is also in the Appendix. Those orders are based upon an order in a precisely similar case, *Matter of Greenwald* v. *Frank,* 32 N.Y.2d 862 (1973), which is also set forth in the Appendix, together with the decision of intermediate appeal, 40 A.D.2d 717, 337 N.Y.S.2d 225, which considers the issues herein.

Jurisdiction

The order of the New York State Court of Appeals was entered on February 13, 1974. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1257(3).

Questions Presented

May the state constitutionally dismiss a police lieutenant from a permanent civil service job solely because he wears a neat goatee?

Does the term "discipline" embody a legitimate state interest which, under the Fourteenth Amendment, may justify curtailment of the rights of policemen?

Is the curtailment of the rights of policemen justified under the Fourteenth Amendment upon the basis that the police are a "quasi-military" organization?

Statement of the Case

Until October 8, 1971, petitioner was a lieutenant in the police force of the respondent, New York City Transit Authority, with full civil service status (R-A6).* In January, 1970, petitioner briefly wore a goatee of the type shown in the photograph in the Appendix (App. p. 19a). He was relieved of duty and was charged with "misconduct" for refusing orders to shave the beard (R-A7).

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* The symbol "R-....." refers to the record in the New York State Court of Appeals.

The charges were based upon a passage in the Manual of Procedure for the transit police, which states, in Ch. 12, para. 27.0 (R-A130):

> A member of the force shall be responsible for the neatness and cleanliness of his person and uniform while on duty.

Pursuant to this regulation the transit police had promulgated a directive on May 15, 1969 (R-A32) forbidding "goatees, beards or other chin adornment."

After a hearing on March 27, 1970, the petitioner was reprimanded upon the following grounds (R-A7, 13-14):

> Respondent's appearance, with his beard, unquestionably is neat and not in violation of the Manual of Procedure. His duty, however, when directed to remove his beard, was to obey and grieve, as compliance did not offer any physical risk nor require the commission of a criminal or illegal act.

The petitioner then shaved his beard, and began a grievance on or about April 25, 1970, which was finally decided against him on or about December 9, 1970, by a decision of a hearing examiner, saying (R-A40):

> The police officer occupies a position of great sensitivity in the community and it is the duty of the Commanding Officer of a Police Department to issue such orders pertaining to mannerism, dress and conduct so as to provide an image of "oneness" to the public that will lead civilians to appreciate and accept the principle that a "Policeman is a policeman, is a policeman."

During the course of the grievance procedure, one of Lieutenant Jackson's superiors gave these reasons for the directive (R-A74):

> 1. The department has the responsibility to insure the neatness of its members (M & P, Chap. 12, para. 27.0) and that wearing beards of assorted shapes and sizes would detract from this appearance of neatness and cleanliness.
>
> 2. Military and semi-military organizations such as the Armed Forces of the United States and the New York City Police Department among many other police departments have similar regulations prohibiting the wearing of beards.
>
> 3. In a recent lawsuit brought in Nassau County, New York, it was held that such a regulation by a police department was proper and necessary and under no circumstances could be considered either arbitrary or capricious.
>
> 4. Lastly, that the wearing of beards, because of the Militant extremists, both on the left and right, among the citizenry would create many unnecessary police problems.

After this adverse ruling, petitioner again grew a goatee of the same type, was again charged with misconduct for refusing to cut it, and was again tried before the same hearing officer as before. Based upon a decision that petitioner was bound by the decision in the grievance procedure, petitioner was found guilty and dismissed from his post on October 8, 1971.

Petitioner then brought this proceeding in Supreme Court, Kings County, alleging that the dismissal violated his rights to privacy, to freedom of expression and to due process and equal protection of the laws, and that it was arbitrary and capricious (R-A9), all under the Fourteenth Amendment to the United States Constitution. Respondent sought to justify the ruling on the grounds set forth in the affidavit of the chief of the Transit Police (R-A132-133), "that said regulation is reasonable and necessary to create a uniform appearance among transit police officers and to insure that each officer has a professional appearance which is essential to engendering public confidence and respect."

The Appellate Division, Second Department, by a three-to-two vote, affirmed the decision of the Transit Authority on February 5, 1973. The dissenting justices relied upon the dissenting opinion in the *Matter of Greenwald* v. *Frank*, 40 A.D.2d 717, aff'd 32 N.Y.2d 862 (1973) (App. p. 6a), a case which was on all fours.

Because a constitutional question was involved the petitioner appealed as of right to the New York State Court of Appeals and that court affirmed the decision below, relying on its summary affirmance in the *Greenwald* case.

REASONS FOR GRANTING THE WRIT

I.

The Decision of the New York State Court of Appeals Conflicts Directly With a Ruling of the Second Circuit Court of Appeals.

The welter of litigation relating to the manner of wearing hair and beards has finally led to a breakdown in the rule of law with relation to public employees in New York State. The decision in the present case relies upon the earlier authority of *Matter of Greenwald* v. *Frank*, 32 N.Y. 2d 862 (App. p. 18a), which was on all fours in its facts, relating, as it did, to hair and beard regulations for policemen. That case was decided on May 30, 1973, and in the interval between that decision and the present one, the Second Circuit Court of Appeals decided *Dwen* v. *Barry*, 483 F.2d 1126 (August 22, 1973). *Greenwald* and *Dwen* were as alike as it is possible for two cases to be, the first relating to grooming regulations for police in Nassau County, and the second to similar regulations in Suffolk County, the immediately contiguous county in Long Island. Yet the decisions are diametrically opposed in principle and in effect. The Second Circuit said:

> We hold only that choice of personal appearance is an ingredient of an individual's personal liberty, and that any restriction on that right must be justified by a legitimate state interest reasonably related to the regulation. 483 F.2d at 1130.

The Appellate Division, in language affirmed without opinion by the State Court of Appeals, said (App. p. 6a):

> The rationale of the modest regulation in question, concerning personal appearance, setting forth rules as to haircuts, sideburns, mustaches and beards, is that there should be neatness and discipline in a large quasi-military organization such as the Nassau County Police Department so that the general public will have respect for the members of the Department. In our opinion this regulation does not raise issues which rise to the dignity of constitutional questions.

The present case was brought in the State courts before, but argued after, both *Dwen* and *Greenwald* had been decided. Petitioner vainly sought a reconsideration of *Greenwald,* to bring it into harmony with *Dwen;* the State Court of Appeals continued to follow *Greenwald.* The refusal of the New York State Court of Appeals to follow *Dwen* has created an untenable situation for uniformed employees in the state. They do not know whether or not regulations relating to beards can be enforced or not. If an employee desires to wear a beard, and seeks relief in the federal courts, he can get it. If the same employee, or one similarly situated, seeks relief in the state courts, he cannot get it. If the employer should seek declaratory relief against employees concerning such grooming regulations in the state courts, he has the power to preempt the field and coerce those employees by the rulings of the state courts, even though they are in conflict with federal precedents.

The issues in this case have recurred dozens of times, and will recur uncountable times in the future, both in the State of New York and elsewhere. See Point II. Not only is this a case in which a conflict between the state and the

federal courts of concurrent jurisdiction requires resolution, but it is also one of particular significance, making it appropriate for this Court at last come to grips with the issues.

II.

The Issues in This Case Are of Particular Significance.

This case comes before this Court not from the world of minor students attacking the grooming regulations of a public school, but from the entirely different arena of adult civil service employees. The petitioner, a black man and formerly a lieutenant in the New York City Transit Authority Police Department, has been deprived of his permanent civil service status because of his insistence on his right to wear a neat goatee. This case affects a different group from that in the student cases, and presents substantially different constitutional issues.

This Court has held that the state may not deprive a person of his employment by means which are unrelated in any rational way to the person's capacity to do the work, *Schware* v. *Board of Bar Examiners,* 353 U.S. 232 (1957). This rule is applied with particular strictness when the state's arbitrary requirements encroach upon a constitutional right of a public employee. As this Court is aware, the scope of the constitutional right to wear one's hair as one pleases is a question much litigated before the courts of the nation. It is not necessary to recite here the mass of decided cases upon the issue; the more than one hundred cases are ably summarized in Note, "On Privacy: Constitutional Protection for Personal Privacy," 48 N.Y.U. Law Rev. 670, 760-770 (1973). The right is rooted in the per-

ception that it is intolerable for the state to interfere in the private habits of public employees for arbitrary reasons. The right to wear one's hair as one pleases has been variously formulated, but has centered on a right of personal autonomy allied to the right of privacy, the right "to be let alone," e.g. *Griffin* v. *Tatum,* 300 F. Supp. 60, 62 (M.D. Ala. 1969), and to the First Amendment right of expression. *Richards* v. *Thurston,* 424 F.2d 1281, 1284 (1st Cir. 1970). See also Note, "On Privacy," *supra* at 761-763. As the Second Circuit Court of Appeals put it in the very case which conflicts directly with this one, *Dwen* v. *Barry,* 483 F.2d at 1130:

> While it has been argued that hair length controversies are much ado about nothing, we think there is a substantial constitutional issue raised by regulation of the plaintiff's hair length. The question is whether the government may interfere with the physical integrity of the individual and require compliance with its standard of personal appearance without demonstrating some legitimate state interest reasonably requiring such restriction on the individual. The first, third, fourth, seventh and eighth circuits have held that the Constitution limits the state's right to regulate the personal appearance of its citizens. We agree. *See* Olff v. East Side Union High School District, 404 U.S. 1042, 92 S.Ct. 703, 30 L.Ed.2d 736 (Douglas, J., dissenting from denial of certiorari).
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> • • • • •
>
> We may well base the right on the guarantee under the Due Process Clause of personal liberty of "a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and

> purposeless restraints. . . ." Poe v. Ullman, 367 U.S. 497, 543, 81 S.Ct. 1752, 1777, 6 L.Ed.2d 989 (1961) (Harlan, J., dissenting). *Cf.* Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 726, 35 L.Ed.2d 147 (1973); Rochin v. California, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183 (1952). Personal liberty is not composed simply and only of freedoms held to be fundamental but includes the freedom to make and act on less significant personal decisions without arbitrary government interference. Limitation of such a right requires some showing of public need. (footnotes omitted)

It is the proposed "legitimate state interest" advanced by the state in the present case, *Matter of Greenwald* v. *Frank, supra,* which has chiefly created the sharp division between courts of coordinate jurisdiction. In *Greenwald,* the state courts held that the "quasi-military" nature of police work justified the regulation; that the interest of discipline alone was enough. In the decision that was affirmed without opinion by the Court of Appeals, and was relied on in this case, such language was adopted by the majority, and was rejected by the dissent (App. pp. 13a-15a). The same sort of justification was used on the record by the administrative authorities in this case. The justification by "discipline" in a "quasi-military" group was used by the District Court in *Dwen* v. *Barry,* 336 F. Supp. 487 (E.D.N.Y. 1971). The Second Circuit specifically rejected that justification, as it appeared both in the District Court below in that case and in the state court in *Greenwald,* 483 F.2d at 1128-1129:

> The civilian police force is a relatively recent development. It arose out of the need to supplement the

private citizen's role in keeping the peace. Any "paramilitarism" of the force stems not from its origin nor from the nature of its duty but from the adoption of an organization with a centralized administration and a disciplined rank and file for efficient conduct of its affairs. The use of such organization evolved as a practical administrative solution and not out of any desire to create a military force. *See* R. Fosdick, American Police Systems ch. 2 (1920); W. Lee, A History of Police in England (1901) (1971 ed.). The police force remains significantly different in character from the military. It is still locally controlled and organized, see N.Y. Unconsol. Laws § 5721, and subject to more direct control of the electorate, N.Y. Unconsol. Laws § 5722, Suffolk County Constitution art. XII § 1202(a), (b)(4), (b)(5) and § 1211. Appointment of members of the force is made under Civil Service Regulation. While police officials are given broad discretion in running a department, dismissal of patrolmen is subject to court review. N.Y. Village Law § 8-806 (McKinney N.Y. Unconsol. Laws § 5732); *see* People ex rel. Hart v. Board of Fire Commissioners, 82 N.Y. 358, 360-61 (1880).

Discipline although essential to an effective police force as it is to the military is clearly of a different type. Instant unquestioning obedience has been found essential to a soldier in action and his training and its attendant discipline is designed to develop such obedience. The same type of instant unquestioning obedience is not necessary for an effective police force. *See* Greenwald v. Frank, *supra,* 40 A.D.2d 717, 337 N.Y.S. 2d at 231-232 (Shapiro, J. dissenting); cf. Orloff v.

> Willoughby, *supra,* 394 U.S. at 94, 73 S.Ct. 534, 97 L.Ed.2d 842. Rather it has been suggested that the military model of organization and discipline must not be followed too closely as a policeman unlike a soldier frequently acts individually on his own initiative and not subject to the immediate supervision of his superiors. *See* W. Lee, A History of Police in England at 401-402. 483 F.2d at 1128-1129. (footnotes omitted)

The Circuit Court thus took issue with the state courts on a basic issue of policy, holding that, where the state chooses to designate the police forces within its borders as "quasi-military" that phrase is not sufficient by itself to establish a desirable policy which may be relied upon to limit federal rights.

The policy embodied in the decision of the court below and specifically rejected by the Second Circuit, justifying the regulation forbidding beards by the alleged "disciplinary" needs of something designated a "quasi-military" organization, presents important policy questions for resolution by this Court. It is a critical question whether the state may appeal simply to the need for "discipline" as a state interest to justify infringement upon the private lives of public employees. Discipline appears to embody a circular idea, by which, in the words of one of the hearing officers in this case, officials try to prove that "a policeman is a policeman, is a policeman" (R-A40).

It is a perhaps more critical question whether the assimilation of the police to the military is a desirable or permissible "state interest" to justify infringement upon the private lives of policemen in a democratic society. As the Second Circuit Court of Appeals pointed out in *Dwen* v.

Barry, supra, that assimilation is a development which has historically been rejected in this country. This Court should consider whether such a policy may be characterized as a legitimate state interest at all, and in particular, whether it can support a regulation which has no stronger justification than those advanced by the New York City Transit Authority in this case. See discussion of the military analogy in a First Amendment context, Moody, "Extending the Shield of the First Amendment to the Outspoken Policeman," 8 Crim. L. Bull. 171, 184-190 (1972).

CONCLUSION

For the reasons set forth above, the petition for certiorari should be granted.

Respectfully submitted,

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Order of the New York State Court of Appeals

February 13, 1974

No. 277/38

In the Matter of

WILBERT JACKSON,

Appellant,

—v.—

NEW YORK CITY TRANSIT AUTHORITY,

Respondent.

Order affirmed, without costs, on authority of *Matter of Greenwald* v. *Frank* (32 N Y 2d 862).

All concur.

Order of the New York State Supreme Court, Appellate Division, Second Department

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on February 5, 1973.

HON. M. HENRY MARTUSCELLO,
Acting Presiding Justice,
HON. HENRY J. LATHAM,
HON. J. IRVING SHAPIRO,
HON. MARCUS G. CHRIST,
HON. ARTHUR D. BRENNAN,
Associate Justices.

In the Matter of

WILBERT JACKSON,

Petitioner,

—v.—

NEW YORK CITY TRANSIT AUTHORITY,

Respondent.

The above named Wilbert Jackson, petitioner, having instituted this proceeding pursuant to article 78 of the CPLR, by a petition verified February 3, 1972, to review respondent's determination, dated October 8, 1971 and made after a hearing, dismissing him from his position of Lieutenant in respondent's Police Department; and respondent

having filed an answer to the petition verified February 23, 1972; by order of the Supreme Court, Kings County, dated March 23, 1972, the proceeding was transferred to this court for determination; the proceeding having been submitted by Paul G. Chevigny, Esq., of counsel for petitioner, and by John A. Murray, Esq., of counsel for respondent; due deliberation having been had thereon; and upon this court's decision slip heretofore filed and made a part hereof; it is:

ORDERED that the determination is hereby confirmed and proceeding dismissed on the merits, without costs.

LATHAM, CHRIST and BRENNAN, JJ., concur.

MARTUSCELLO, Acting P.J., and SHAPIRO, J., dissent and vote to annul the determination in consonance with the view expressed by Shapiro, J., in Matter of Greenwald v. Frank (40 A D 2d 717), in which Martuscello, Acting P.J., concurs.

ENTER:

IRVING N. SELKIN
Clerk

Order of the New York State Supreme Court, Appellate Division, Second Department

January 11, 1973.

In the Matter of Wilbert Jackson,
petitioner, v. New York City
Transit Authority, respondent.

Proceeding pursuant to article 78 of the CPLR to review respondent's determination, dated October 8, 1971 and made after a hearing, dismissing petitioner from his position of Lieutenant in respondent's Police Department.

Determination confirmed and proceeding dismissed on the merits, without costs. No opinion.

LATHAM, CHRIST and BRENNAN, *JJ.*, concur.

SHAPIRO, *J.*, dissents and votes to annul the determination in consonance with the views expressed by him in Matter of Greenwald v. Frank (40 A D 2d 717), in which MARTUSCELLO, *Acting P.J.*, concurs.

February 5, 1973.

IN RE JACKSON v. N.Y.C. TRANS. AUTH.

1921 E/72

Opinion of New York State Supreme Court, Appellate Division, Second Department in *Matter of Greenwald* v. *Frank*

SUPREME COURT

APPELLATE DIVISION—SECOND DEPARTMENT

Oct. 30, 1972.

In the Matter of DANIEL GREENWALD, etc.,

Appellant,

v.

LOUIS J. FRANK, Commissioner of Police of the County of Nassau, et al.,

Respondents.

Before LATHAM, Acting P.J., and GULOTTA, BRENNAN, BENJAMIN and SHAPIRO, JJ.

MEMORANDUM BY THE COURT.

In a proceeding pursuant to article 78 of the CPLR (which, upon the parties' stipulation, was treated as an action for a declaratory judgment) to annul and cancel Rule 22 of Article VIII of the Rules and Regulations of the Nassau County Police Department, petitioner appeals from a judgment of the Supreme Court, Nassau County, 70 Misc.2d 632, 334 N.Y.S.2d 680, entered July 19, 1972, which dismissed the petition.

Judgment modified, on the law, by striking therefrom the decretal provision dismissing the petition and substituting

therefor a provision adjudging said Rule 22 valid. As so modified, judgment affirmed, with costs to respondents.

The rationale of the modest regulation in question, concerning personal appearance, setting forth rules as to haircuts, sideburns, mustaches and beards, is that there should be neatness and discipline in a large quasi-military organization such as the Nassau County Police Department so that the general public will have respect for the members of the Department. In our opinion this regulation does not raise issues which rise to the dignity of constitutional questions.

LATHAM, Acting P.J., GULOTTA, BRENNAN and BENJAMIN, JJ., concur.

SHAPIRO, J., dissents and votes to declare the portion of the rule in issue to be unconstitutional, with the following memorandum:

In this action for a declaratory judgment[1] the Special Term found that "the petitioner has not demonstrated that a triable issue exists concerning the relationship of his determining his own personal appearance while in uniform to that of the public interest. Therefore, Louis J. Frank, Commissioner of Police of the County of Nassau, and the Police Department of the County of Nassau are entitled to summary judgment declaring the regulation in its present form valid" (Matter of Greenwald v. Frank, 70 Misc. 2d 632, 639, 334 N.Y.S.2d 680, 688).

In his petition, which was begun by him both in his individual capacity as a member of the Police Department of

[1] The proceeding was originally instituted as one under article 78 of the CPLR, but by the consent of counsel and order of the Special Term it was deemed to be "an action for declaratory judgment" (CPLR 103) and the papers before the court as a motion for summary judgment.

Nassau County and as president of the Nassau County Patrolmen's Benevolent Association[2] on behalf of all others similarly situated, petitioner alleges that he "desires to have sideburns which are below the bottom of his ear lobe, a moustache which extends over the top of his upper lip and beyond the corners of his mouth, and a beard or goatee" and that the rule adopted by the Police Department which prohibits him from doing so is an arbitrary, capricious and unreasonable restriction on his personal choice of appearance, interferes with his personal life while off duty and is in violation of his statutory and constitutional rights.

That portion of the rule adopted by the Police Department which is here attacked provides as follows:[3]

> "Personal Appearance—The provisions of Article VIII, Rule 22 of the rules and regulations pertaining to sideburns shall be adhered to and in no case shall sideburns extend to a point below ¾ of an inch above the bottom of the ear lobe. All provisions relating to moustaches, beards and haircuts shall be strictly conformed with.
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[2] The Nassau County Patrolmen's Benevolent Association is the certified bargaining agent for all members of the Nassau County Police Department from patrolmen to detective-captain.

[3] The balance of the rule which petitioner does not put into issue reads:

> "Personal Appearance—Members of the Force and Department shall be neat and clean at all times while on duty. Male personnel shall comply with the following grooming standards unless excluded by their Commanding Officer due to special assignment:
>
> Haircuts—Hair shall be neatly cut and trimmed at all times while on duty. Hair styles shall be conservative and not excessive in length."

"Moustaches—A short and neatly trimmed moustache may be worn, but shall not extend over the top of the upper lip or beyond the corners of the mouth.

Beards, Goatees—Male personnel shall be clean shaven when reporting for duty. Beards or goatees shall not be worn while on duty. A growth of whiskers shall be permitted while on duty for medical reasons only when approved by the Chief Surgeon."

Respondents contend that the rules in question are within the power granted the Commissioner, as such, to promulgate regulations governing grooming standards. In opposition to the petition the Commissioner asserts that those accepting appointment as policemen in the Nassau County Police Department agree to abide by its rules and regulations, "which were reasonably enacted for the promotion of order and discipline," and that while petitioner, as a private individual, "might have a constitutionally-protected right to freedom of appearance"—"within prescribed limits", he has no "constitutional right to be a police officer, and to ignore the Rules and Regulations concerning appearance reasonably enacted by the Police Department." The Commissioner also conclusorily contends that the rule "is reasonable and necessary to create a uniform appearance among police officers of Nassau County and to insure that each officer has a professional appearance, which is essential to engendering public confidence and respect."

Special Term determined (1) that a policeman is a public employee with unique characteristics, (2) that therefore his right to determine his personal appearance may be limited and circumscribed, because it is a concern of the Police Department in the maintenance of discipline, and (3) that a policeman's personal appearance while in uniform has a

direct relationship to the public interest, concern and confidence. Special Term, therefore, granted summary judgment declaring the police rules in question valid although the judgment, as entered, instead of so declaring, dismissed the petition (see Lanza v. Wagner, 11 N.Y.2d 317, 334, 229 N.Y.S.2d 380, 393, 183 N.E.2d 670, 679).

What is really here involved is the propriety of the reaction by the Commissioner to a major widespread change in custom with respect to men's habits of dress.

Carnaby Street and the Beatles have wrought vast changes in the appearance of the American male, a change which, though viewed with alarm by many, has undeniably altered long standing customs of male appearance. Thus the wearing, by men, of hair often longer than that usually worn by women, and flowing moustaches and beards, is now commonplace in our society. As a result, a substantial number of cases involving the right of an individual to determine his personal appearance have come before the courts.

The first cases challenging the wearing of long hair by males arose in the schools when educational authorities sought to impose standards of length for hair which barred the Beatle hairdo from the public school classroom (Zachry v. Brown, D.C., 299 F.Supp. 1360; Breen v. Kahl, 419 F.2d 1034, cert. den. 398 U.S. 937, 90 S.Ct. 1836, 26 L.Ed.2d 268). While the results varied, what finally emerged from these cases and from other litigation which developed when some public officials sought to impose on their employees similar standards of conformity was a judicial recognition that there is a constitutional right to determine one's own personal appearance and that, therefore, the State bears the burden of establishing substantial justification for any regulation it may impose which limits that right (see Crews v. Clones, 7 Cir., 432 F.2d 1259, 1264; Richards v. Thurston,

1 Cir., 424 F.2d 1281; Breen v. Kahl, *supra;* Lindquist v. City of Coral Gables, D.C., 323 F.Supp. 1161).[4] As Mr.

[4] The most recent decision I am aware of on the subject of the constitutional right of a student to wear his hair long is Arnold v. Carpenter, 459 F.2d 939 [7th Cir., 1972], where Circuit Judge Kiley, speaking for the majority, said in a footnote (pp. 941-942):

"The circuits are presently divided 4-4 as to the constitutional right of a student to choose the length of his hair.

The First, Fourth, Seventh and Eighth Circuits have recognized the right, although they differ as to its source. In Breen v. Kahl, 419 F.2d 1034 (7th Cir. 1969), cert. den. 398 U.S. 937, 90 S.Ct. 1836, 26 L.Ed.2d 268, this court placed the right as either within the penumbras of the First Amendment freedom of speech, or within the Ninth Amendment rights retained by the people. In Richards v. Thurston, 424 F.2d 1281 (1st Cir. 1970), the court designated the right as within the 'liberty' assurance of the Fourteenth Amendment due process clause. In Bishop v. Colaw, 450 F.2d 1069 (8th Cir. 1971), the Eighth Circuit identified the right as the 'freedom to govern one's personal appearance' and retained under the Ninth Amendment. Finally, in Massie v. Henry, 455 F.2d 779 (4th Cir., decided Feb. 2, 1972), the court referred to the right to wear hair as one wishes as 'an aspect of the right to be secure in one's person guaranteed by the due process clause' but having 'equal protection' overlappings.

The Fifth, Sixth, Ninth and Tenth Circuits do not recognize any constitutional right and have upheld regulations limiting the length and style of hair, although their approaches have also differed. The most prevalent view among these circuits is that the 'long hair' problem is too insubstantial to warrant federal court consideration. Stevenson v. Board of Education, 426 F.2d 1154 (5th Cir. 1970), cert. den. 400 U.S. 957, 91 S.Ct. 355, 27 L.Ed.2d 265; King v. Saddleback, 445 F.2d 932, 940 (9th Cir. 1971); Freeman v. Flake, 448 F.2d 258 (10th Cir. 1971). In Jackson v. Dorrier, 424 F.2d 213 (6th Cir. 1970), cert. den. 400 U.S. 850, 91 S.Ct. 55, 27 L.Ed.2d 88, the court held that there was no violation of First, Ninth or Fourteenth Amendment rights and that the 'regulation ha[d] a real and reasonable connection with the successful operation of the educational system and with the maintenance of school discipline.' 424 F.2d at 218.

It is understandable why some judges find students' 'long hair' claims constitutionally insubstantial. Measured against today's great constitutional issues (capital punishment, abortion, school segregation) the question of whether a student

Justice Meyer pointed out in Matter of Hunt v. Board of Fire Comrs. of Massapequa Fire Dist., 68 Misc.2d 261, 267-269, 327 N.Y.S.2d 36, 43-45, there are more than 50 hair cases dealing with whether there is a constitutional right to determine one's own hair style and the weight of authority is that this right is to a fundamental liberty for violation or limitation of which the State must establish substantial justification. In that case the court ruled that the respondent fire department showed no factual justification for limiting the length of sideburns and other facial hair worn by members of the fire department and, in doing so, rejected the argument that the fire department was a para-military organization in which it was important to its functioning that discipline and uniformity of appearance be maintained. (See, also, to the same effect, Lindquist v. City of Coral Gables, D.C., 323 F.Supp. 1161, *supra.*)

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may or may not have constitutional protection in selection of his hair dress appears *de minimis.* Perhaps even judges who sustain the right are nagged with impatience and doubt when faced with student claims. But we look down across a gap of a generation or two, from the Olympian heights of what we consider the great issues. For the high school student claimant, however, the right to wear 'long hair' is an issue vital to him and we have seen what he is willing to sacrifice for his claim. It is settled that the students have constitutional rights of freedom and there appears to be no reason why the values of freedom are less precious in a younger generation than in an older. The principle of freedom as the source of our free choices of conduct does not change from generation to generation. Its application on particular facts in student cases is subject to limitation relative to the age, needs and situation of the student and to the reasonable requirements of the common good or state interests. For these reasons it would seem appropriate for the courts to acknowledge the student right as substantial and weigh its exercise in each case with due regard to the freedom and good of the student and to the reasonable needs of the school."

Our problem would be simple were it not for the fact that, despite the weight of authority in the decided cases holding that the State must establish substantial justification for interfering with the right of governmental employees to determine their own hair style, it is also well settled that the courts have consistently refused to apply this test to members of the armed forces, even though they be only part-time members enlisted in the National Guard (Anderson v. Laird, 437 F.2d 912, cert. den. 404 U.S. 865, 92 S.Ct. 68, 30 L.Ed.2d 109; Gianatasio v. Whyte, 426 F.2d 908, cert. den. 400 U.S. 941, 91 S.Ct. 234, 27 L.Ed.2d 244). In the latter case the plaintiff, a member of the National Guard, claimed that his long hair was essential to his regular civilian job, but the court found against him on the ground that it was reluctant to interfere with the discretion of the military in such matters.

It was on the rationale of these decisions involving the military and Matter of Taxter v. Looney (Supreme Court, Nassau County, Index No. 13898/69, Feb. 6, 1970) and Dwen v. Barry, D.C., 336 F.Supp. 487 that Special Term leaned heavily in this case in upholding the propriety of the respondent Police Department's rules barring sideburns below the ear, long moustaches, and beards. In Matter of Taxter v. Looney (*supra*) Mr. Justice Levine dismissed a petition attacking such a rule saying in part:

> "The limited restraint imposed by uniform grooming standards on certain individual members would appear to be entitled to less consideration than the overall benefit to be derived by the appearance of the Department as a whole. Similar regulations have been imposed in other sections of the country. The Court cannot hold that the respondent was arbitrary or that the constitutional rights of the petitioner were violated."

In Dwen v. Barry, D.C., 336 F.Supp. 487, *supra,* Chief Judge Mishler denied a preliminary injunction against enforcement of a regulation setting grooming standards for members of the Suffolk County Police Department which forbade beards and goatees and sideburns below the lowest part of the exterior ear opening and allowing only short and neatly trimmed moustaches. He said (pp. 487-488):

> "Uniformity of dress is part of the discipline of the local police department. It is the visible sign of the presence of the law. How the police officer appears in the public is one factor in effective law enforcement. Regulations involving dress and grooming are better left to the officials who are aware of the local customs and taboos. It would be inappropriate for the court to frame such regulations, absent a clear showing of a violation of a constitutional right."

Judge Mishler, citing Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510, recognized that application of the rule to governmental employees not in uniform might well bring the regulation within the prohibitions of the Constitution, but he rejected the plaintiff's attempt to distinguish the police from the military for the purpose of the regulation.

Both Chief Judge Mishler and Justice Levine read the law as barring only arbitrary State action rather than as placing on the State a burden of establishing substantial justification for any limitation of the constitutional right to determine one's own hair style. Judge Mishler went even further when he applied the doctrine that the police, like members of the armed services, have limited constitutional rights, a conclusion for which no support is found in current constitutional law. (See Hunt v. Board of Fire Comrs. of Massapequa Fire Dist., 68 Misc.2d 261, 264, 327 N.Y.S.2d 36, *supra,* and the cases and law review article there cited.)

While it has been held that the uniformed services in municipalities, particularly police and firemen, are either para-military or quasi-military, it has never been held authoritatively that they are so military in nature as to have only limited constitutional rights. Even as long ago as 1888 our Court of Appeals would go no further than to say that "the government of a police force *assimilates* to that required in the control of a military body" (People ex rel. Masterson v. French, 110 N.Y. 494, 499, 18 N.E. 133; emphasis added). That statement, like the Holmes dictum in McAuliffe v. Mayor & Bd. of Aldermen of New Bedford, 155 Mass. 216, 220, 29 N.E. 517, that "petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman," has been relegated to the dust heap of history (cf. Garrity v. New Jersey, 385 U.S. 493, 87 S.Ct. 616, 17 L.Ed.2d 562). In *Garrity* the court said, "We conclude that policemen, like teachers and lawyers, are not relegated to a watered-down version of constitutional rights" (p. 500, 87 S.Ct. p. 620). That court, too, has rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a "right" or a "privilege". (Graham v. Richardson, 403 U.S. 365, 375, 91 S.Ct. 1848, 29 L.Ed.2d 534; Gardner v. Broderick, 392 U.S. 273, 88 S.Ct. 1913, 20 L.Ed.2d 1082; Uniformed Sanitation Men Assn. v. Commissioner of Sanitation, 392 U.S. 280, 88 S.Ct. 1917, 20 L.Ed.2d 1089; Pickering v. Board of Educ., 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811; People v. Samuel, 29 N.Y.2d 252, 327 N.Y.S.2d 321, 277 N.E.2d 381.) A para-military or a "quasi-military" organization is not a military organization and the similarity in the words used cannot be used to justify treating the two as if they are one and the same. A police department deals with civilians and carries out a civilian function. Armies, except for

civilian insurrections, deal with armies where unquestioning obedience is a must.

While in the armed forces a superior officer's authority might be undermined if his orders were flouted by his subordinates, that fact can hardly serve to justify sustaining orders of superiors in non-military organizations where, without substantial justification, such orders infringe constitutional rights (cf. Griffin v. Tatum, D.C., 300 F.Supp. 60, 63).

To accept respondents' contention that a policeman is in the same category as a soldier would justify the adoption of a rule—for the sake of uniformity and for easy recognition—that all police officers have their heads shaved bald—as was once the custom in the United States Marine Corps. I assume that respondents here would not urge that their rule-making power extended that far, but that would be the logical conclusion of their contention that a policeman may be subjected to the same limitation of personal rights as a soldier.

Under respondents' rule Abraham Lincoln and Charles Evans Hughes could not have qualified as members of respondents' police force; nor could many of America's finest specimens of physical manhood seen daily on television (baseball, football and basketball players) qualify without first going through a Samson-like shearing; and Theodore Roosevelt might never have become President of the United States had he not before that made his mark, walrus moustache and all, as Police Commissioner of the City of New York from 1895 to 1897.

Wearing a uniform has for its purpose the demonstration to the general public that the wearer is a member of a particular group and has the authority which is a concomitant of that membership. It is to the uniform that the public

reacts, not to the length of hair of the wearer or to the length and breadth of his sideburns or whether he wears a long moustache, or a goatee or beard. The uniform is what signifies and makes manifest the authority entrusted to the wearer, not the color of skin or of eyes or hair, or the shape of the haircut or the other hirsute adornments the wearer of the uniform displays on his face. It is to the uniform that the members of the public react and should yield respect. Policemen are not Lippizaner stallions. They are human beings doing a vital, necessary and ofttimes unpleasant, even dangerous, job. There is no factual showing in the record why they must be compelled by their superiors to maintain a uniformity of hair style. No proof has been advanced to demonstrate any adverse effect of longer sideburns or moustaches or beards or goatees on their effectiveness as policemen. On the contrary, the enforcement of a rule such as the one here under consideration, which in effect would require the use of a tape measure to determine whether the length of a policeman's sideburns was in fact ¾ of an inch above the lower part of his ear lobe, might seriously undermine the morale of any police force. Hence the State has failed to meet its burden of substantial justification for interfering with petitioner's constitutional right to determine his own appearance.[5]

Even if that were not so, there would still be a factual question left requiring the reversal of the summary judgment obtained by respondents. In my opinion, however,

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[5] While petitioner makes no contention to that effect, since he, himself, may well have no religious motivation for wearing a beard or long sideburns, the fact is that one effect of the rule here under consideration may well be to bar from eligibility for membership on the police force adherents of religions which bar cutting the hair on one's face or require the wearing of a beard by adult male adherents, such as certain Muslim sects (Matter of Eastern Grey-

respondents have merely set forth conclusory allegations which are insufficient to raise an issue of fact.[6]

The judgment should be reversed and petitioner's motion should be granted declaring the rule insofar as in issue here to be invalid.

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hound Lines, Inc. v. New York State Div. of Human Rights, 27 N.Y.2d 279, 317 N.Y.S.2d 322, 265 N.E.2d 745) and certain other religious sects.

It is noteworthy, in this connection, that the portion of the rule attacked by petitioner dealing with beards and goatees contains an exception permitting a "growth of whiskers * * * while on duty for medical reasons." If such an exception can be countenanced without endangering "order and discipline" within the Department, how can it be argued that the need for order and discipline makes reasonable the action of the Police Department, an arm of the State, in thus, indirectly, establishing a religious test for public employment as a policeman?

The rule under consideration here, if allowed to stand, could be State action involving religious discrimination in employment in a public service and would therefore be in violation of the First Amendment (Sherbert v. Verner, 374 U.S. 398, 410, 83 S.Ct. 1790, 10 L.Ed.2d 965), made applicable to the states by the Fourteenth Amendment (Everson v. Board of Educ. of Twp. of Ewing, 330 U.S. 1, 16, 67 S.Ct. 304, 91 L.Ed. 711).

As one judge, now a member of this court, has pointed out, the test of the State's right to interfere with conduct resulting from the exercise of the right to freedom of religion safeguarded by the First Amendment is that such interference be "a reasonable nondiscriminatory regulation by the governmental authority which has as its purpose the promotion of public good and safety" (Martuscello, J., in Matter of Council v. Donovan, 40 Misc.2d 744, 750, 244 N.Y.S.2d 199, 206). In my view respondents herein have failed utterly to meet this test. The regulation is discriminatory in impact and nothing other than conclusory statements have been offered to establish the reasonableness of the portion of the regulation attacked or to show that it in any way will promote the public good and safety.

[6] It should be explained that the Commissioner's right to require the members of the Department to be "neat and clean at all times while on duty" and to require that their "hair style shall be neatly cut and trimmed at all times while on duty" and that their "hair styles shall be conservative and not excessive in length"—as is provided for in that portion of the rule not under attack—gives him all the authority he should reasonably have to supervise the appearance of his personnel.

Order of New York State Court of Appeals in *Matter of Greenwald* v. *Frank*

COURT OF APPEALS
OF NEW YORK

May 30, 1973.

32 N.Y.2d 862

In the Matter of DANIEL GREENWALD *et al.*,
Appellant,

—v.—

LOUIS J. FRANK, Commissioner of Police of the County of Nassau, and the Police Department of the County of Nassau,
Respondents.

Order, 40 A.D.2d 717, 337 N.Y.S.2d 225, affirmed, without costs. No opinion.

All concur.

Photograph of Petitioner, from Record Below

FILED
JUN 13 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1698

WILBERT JACKSON,

Petitioner,

—v.—

NEW YORK CITY TRANSIT AUTHORITY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1698

WILBERT JACKSON,

Petitioner,

—v.—

NEW YORK CITY TRANSIT AUTHORITY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Determination Below

The decision of the New York Court of Appeals (Petition, 1a) is reported at 33 N Y 2d 958. The decision of the New York Supreme Court, Appellate Division, Second Department (Petition, 2a) is reported at 41 A D 2d 646.

Jurisdiction

The jurisdictional requisites set forth in the petition (Petition, p. 2) are not adequate to sustain jurisdiction in this Court.

Question Presented

Does petitioner's dismissal from service as a Transit Police Lieutenant after hearing, on a sustained charge of repeated and wilful refusals to obey lawful orders of his superior officer relative to the removal of a "goatee" present an issue which rises to the dignity of a constitutional question?

Statement

The facts are substantially as set forth in the petition—except that the dismissal was based not only on petitioner's repeated failure to obey the orders to cut his goatee but also on the basis of other charges, i.e., failure to produce his identification and off-duty revolver when ordered by his superiors to do so. Furthermore, the case reached the New York State Court of Appeals not because, as petitioner states, a constitutional question was involved but because petitioner had an absolute right to an appeal to the State's highest court because of a dissent in the court below. Cf., CPLR §5601(a).

The litigated issue here was whether the repeated failure to obey orders issued by superior officers was proper ground for dismissal.

The Court of Appeals found that the petitioner was properly dismissed. The matter never rose to the dignity of a constitutional question. Cf., *Matter of Greenwald* v. *Frank*, 40 A D 2d 717 (2nd Dept., 1972), aff'd 32 N Y 2d 862 (1973).

Proceedings in the New York Courts

Petitioner was afforded a hearing in accordance with the provisions of New York State Civil Service Law, §75. This statute inhibits removal or other disciplinary action to the benefit of a broad class of public employees, including the petitioner, except for incompetency or misconduct shown after a due process hearing on stated charges.

The proceedings in the courts of New York were brought pursuant to Article 78 of the N. Y. Civil Practice Law and Rules to review the findings of guilt and the respondent's determination dismissing petitioner from service (R-A 18-20).* Under Article 78 (CPLR §7801 *et seq.*) the State Court had the power to decide whether the determination was made in violation of lawful procedure, was affected by an error of law, was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed, and whether the determination made as a result of a hearing held, and at which evidence was taken pursuant to direction by law is, on the entire record supported by substantial evidence. (Cf., §7803, subds. 3 & 4.) The State Court also had the power to make a broad review of the factual issues presented including a searching inquiry into the validity of any State or Federal Constitutional issues. Cf., *Matter of Di Maggio* v. *Brown,* 19 N Y 2d 283 (1967); *Matter of Finn's Liquor Shop, Inc.* v. *State Liq. Auth.,* 24 N Y 2d 647 (1969), cert. den. 396 U.S. 840 (1969).

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* Numbers and letters in parentheses, unless otherwise indicated, refer to the pages of the Record on Appeal in the New York Court of Appeals.

POINT I

The decision below is based on adequate and independent state grounds and is, therefore, not subject to review in this Court.

Petitioner seeks to invoke the jurisdiction of this Court pursuant to 28 U.S.C.A. §1257(3) on the ground that his dismissal from service as a Transit Police Lieutenant was based "solely" on his failure to remove a "goatee" violated his rights under the First and Fourteenth Amendments.

It is clear, however, that the Authority discharged petitioner from employment on two separate sustained charges, one of which involved his repeated failure to obey the lawful orders of his superiors to remove his "goatee". In the courts of New York he questioned only the sustained charge of failing to comply with the grooming regulation without any prior attempt to test the validity of the regulation in the New York courts.

This Court, "from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds." *Herb* v. *Pitcairn,* 324 U.S. 117, 125 (1945) [and cases cited therein]. This basic policy stems from judicial reluctance to render advisory opinions by permitting the interjection of so-called "constitutional issues" into controversies which state tribunals have resolved primarily in terms of state law. Whether the non-federal ground on which the state court relied is right or wrong is not of concern to this Court. "It is enough that it is, at least, not without fair support." *Fox Film Corp.* v. *Muller,* 296 U.S.

207, 209 (1935). The decision of the New York courts, in the proceeding at bar was based squarely and exclusively on independent and adequate grounds of state law.

The burden of establishing jurisdiction is not met if "it appears that the judgment [below] *might* have rested on a nonfederal ground," *Stembridge* v. *Georgia,* 343 U.S. 541, 547 (1952). This Court is not concerned with the scope of review which state tribunals choose to accord the decisions of administrative or quasi-judicial bodies. This is a matter exclusively for the courts of the state. *Black* v. *Cutter Laboratories,* 351 U.S. 292 (1956). Cf., also *Matter of Vetere* v. *Allen,* 15 N Y 2d 259 (1965), cert. den. 382 U.S. 825 (1965). It follows that the state court judgment based on an adequate and independent nonfederal ground presents no question for review by the Court, even though a federal question might possibly have been involved. *Fox Film Corp.* v. *Muller, supra; Berea College* v. *Kentucky,* 211 U.S. 45 (1908).

POINT II

Enforcement of the text of Directive 25 which, *inter alia* prohibited the growth of "goatees, beards or other chin adornments" presents no substantial federal question.

The two asserted reasons which petitioner presents for the grant of certiorari are (1) an alleged "conflict" of decisions between the New York Court of Appeals and the Second Circuit Court of Appeals and (2) the asserted "significance" of the issues presented in the case at bar. We will consider these issues in inverse order presented in the petition.

The Decision Below Was Clearly Correct and Presents No Significant Issues for Review by This Court

Petitioner pleads the defense of justification, as he did in the Courts of New York, to the primary sustained charge of wilful and repeated refusal to obey the lawful orders of his superior. The orders directed him, on separate occasions in both 1970 and 1971, to comply with the provisions of the Transit Police Department grooming regulation and to remove a "goatee." The "significance" of this defense is allegedly grounded on petitioner's contention (Br., pp. 8-9) that the state may not deprive a person of his employment for refusing to obey a command where such command is "unlawful or arbitrary" or where obedience would violate the Constitutional rights of the employee citing *Schware* v. *Board of Bar Examiners,* 353 U.S. 232 (1957). According to petitioner (*id.*), the order in question was arbitrary because he felt that it was unrelated to his work as a police lieutenant and his dismissal based on non-compliance was unconstitutional as a deprivation of due process or equal protection. Neither contention is valid.

Policemen like teachers, lawyers and students are "not relegated to watered-down versions of constitutional rights." *Garrity, et al.* v. *New Jersey,* 385 U.S. 493, 500 (1967). Cf., also *Gardner* v. *Broderick,* 392 U.S. 273 (1968). However, it does not necessarily follow that a policeman has or retains the same constitutional right as a teacher or a lawyer or a student to determine his own personal appearance while serving the public interest whether in or out of uniform. Indeed, as the United States Court of Appeals recently observed in *Stradley* v. *Andersen,* 349 F. Supp. 1120 (D.C. Neb., 1972), aff'd 478 F. 2d 188, 190-191 (8th Cir., 1973), in sustaining the validity of a virtually

identical police grooming regulation against a due process challenge:

> [1, 2] We reject the idea that community standards provide a legitimate basis in weighing constitutional rights guaranteed to the individual. Whether public acceptance or rejection of a particular hair style exists in one community or another should not be a standard of concern to a federal court. What must be controlling to the court in evaluating competing interests is whether the policy of the state espouses a societal interest which outweighs the individual concern. Thus, what is essential here is that the Public Safety Department stresses the need for public respect of its officers and that it feels such respect flows in part from the officers' individual appearance. If Chief Andersen misjudges, as plaintiff suggests, what necessary measures should be taken to achieve community respect, this basically must be the department's concern, not ours.
>
> [3] One may argue that how one wears his hair has little to do with whether an officer might effectively apprehend criminals or otherwise fulfill his assigned mission as a policeman. This misses the mark. The critical factor is that police officialdom deems it necessary that the officer be well disciplined and that as part of that internal discipline, he be required to maintain a neat appearance. The degree of that appearance, as long as it is not arbitrary or unreasonable, should not be the court's concern.

Cf., also *Matter of Krolick* v. *Lowery,* 32 A D 2d 317, 322 (1st Dept., 1969), aff'd 26 N Y 2d 723 (1970), cert. den. *sub nom. Vyse et al.* v. *Lowery,* 397 U.S. 1075 (1970); *Matter of Lederman* v. *New York City Transit Authority,*

35 A D 2d 996 (2nd Dept., 1970), lv. to app. den. 28 N Y 2d 489 (1971), rearg. den. 29 N Y 2d 749 (1971), cert. den. 405 U.S. 995 (1972); *Matter of Greenwald* v. *Frank, supra.*

No serious contention may be made that the enforcement of Directive 25 in this case constituted a deprivation of equal protection of the law. On this point petitioner relies (Br., p. 8) on the fact that he is a "black man" and "has been deprived of his permanent civil service status because of his insistence on his right" to wear a "goatee." But no allegation is made that petitioner was singled out or that the respondent permits other Transit Patrolmen, white, black or Hispanic, to determine their own grooming standards. It is submitted that the requirements of equal protection of the law are met. *Louisiana ex rel. Francis* v. *Resweber,* 329 U.S. 459 (1947), rearg. den. 330 U.S. 853 (1947). Cf., also *Brooks* v. *School Dist. of City of Moberly, Mo.,* 267 F. 2d 733 (9th Cir., 1959), cert. den. 361 U.S. 894 (1959); *Byrd* v. *Sexton,* 277 F. 2d 418 (8th Cir., 1960), cert. den. 364 U.S. 818 (1960).

The answer to petitioner's related contention (Br., pp. 12-13) that his rights under the First Amendment (the growing of a beard was characterized in the Courts below as "a symbolic expression"), as protected by the Fourteenth Amendment, were violated, may be found in the United States Court of Appeals ruling in *Dewey* v. *Reynolds Metal Co.,* 429 F. 2d 324 (6th Cir., 1970), aff'd by this Court, 402 U.S. 689 (1970). Dewey entered the employ of Reynolds before he acquired his religious beliefs as a Sabbath observer. His employer sought to accommodate its employees by interpreting a collective bargaining agreement to permit any employee assigned to overtime to be relieved from the assignment simply by arranging for another qualified employee to replace him. When Dewey re-

fused the overtime assignment and declined to arrange a suitable replacement, he was discharged.

The District Court directed Dewey's reinstatement on a holding that his right to freedom of religion had been violated. The Court of Appeals reversed on a finding (at p. 335) that religious discrimination could not be equated with a failure to accommodate, that the employer's accommodation was reasonable and that an "employer ought not to be forced to accommodate each of the varying religious beliefs and practices of his employees."

A similar set of facts was also presented to the New York Court of Appeals in *Eastern Greyhound* v. *Division of Human Rights,* 27 N Y 2d 279 (1970). In that case the Court affirmed a determination annulling a sustained civil rights complaint of refusal to hire for "creed". There the complainant was refused a job as a baggage clerk because he declined to shave off his beard which his religion required him to wear. The Court found (at p. 283) that the company policy requiring employees to be "clean-shaven" rested "on a desire to promote business by greater public support (and) could justify the exclusion" of bearded applicants and "have no possible religious connotation." So in the case at bar, the directive was reasonable and necessary to "create a uniform appearance * * * and to insure that each officer has a professional appearance," an essential "to engendering public confidence and respect" (R-A 132-133). Such "uniform" appearance has been held to be essential, in *Stradley* v. *Andersen, supra* (349 F. Supp. at p. 1123) so "that the public (may) be able to recognize police officers immediately." That Court found it to be apparent "that any hesitation (on the part of the public) in seeking assistance or cooperating with officers because of

the unique position of policemen could mean the difference between life and death."

There Is No Present Conflict of Decisions Warranting a Review by This Court

Petitioner's second ground for the grant of certiorari is an asserted conflict of decisions between the New York Court of Appeals, in *Matter of Greenwald* v. *Frank*,* *supra*, and the Second Circuit, United States Court of Appeals decision in *Dwen* v. *Barry*, 483 F. 2d 1126 (1973). The Second Circuit, however, as yet to rule on the Suffolk County Police grooming regulation.

In the *Dwen* case, a Suffolk County, New York, patrolman commenced a civil rights action to invalidate a hair grooming regulation of that county's police department. The District Court, in 336 F. Supp. 487, denied a preliminary injunction and summarily dismissed the action. But on appeal the Second Circuit reversed, rejecting the District Court's summary dismissal of plaintiff's complaint. The scope of the Second Circuit decision was as follows (483 F. 2d at p. 1130):

> "We hold only that choice of personal appearance is an ingredient of an individual's personal liberty, and that any restriction on that right must be justified by a legitimate state interest reasonably related to the regulation."

In directing a trial on the issue "of establishing a genuine public need for the regulation" the Court emphasized (at p. 1131) that "[w]e imply no views on the merits."

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* In the case at bar, the New York Court of Appeals unanimously affirmed the order of the Appellate Division, Second Department "on the authority of *Matter of Greenwald* v. *Frank*" (Petition 1a).

On remand and after a trial in which evidence was offered to show that the regulations served the dual purpose of "safety and morale", the District Court (MISHLER, J.) rendered an opinion (Respondent's appendix, pp. 13-16) finding that "with the exception of the general requirement that hair, sideburns and moustaches (must) be neatly trimmed, the regulations do not provide standards for proper grooming." The District Court concluded, therefore, that the Suffolk County Police Department failed to establish a legitimate state interest requiring these restrictions and that the regulations were violative of due process as "an arbitrary limitation and a purposeless restraint." This decision, not yet appealed to the Second Circuit, would seem to be contrary in result to the Eighth Circuit opinion in *Stradley* v. *Andersen, supra,* where there was proof, as there is in the case at bar, that public respect "flows in part from the officer's general appearance." In accord, *Matter of Greenwald* v. *Frank, supra.* On these facts no conflict of decisions warranting review by this Court has been presented. Cf., *United States* v. *Constantine,* 296 U.S. 287 (1935).

Since justification for the respondent's grooming regulation in the case at bar did not rest on the needs of discipline alone nor on an alleged "safety and morale" issue, we submit that the criteria to be applied are not the same as that applied in student "hair" cases. Cf., *Breen* v. *Kahl,* 419 F. 2d 1034, 1036 (7 Cir., 1969), cert. den. 398 U.S. 937 (1970). The Courts have sustained the right of a student to "do his thing" by wearing his hair at such length as he determines. This, however, should not be used to overturn a police grooming regulation in view of the demonstrated countervailing State interest and concern in a disci-

plined and efficient police force. Cf., *Brukiewa* v. *Police Commissioner of Baltimore City,* 263 A. 2d 210 (Ct. of App. Md., 1970). This interest offsets petitioner's private interest to determine his own personal appearance and the enforcement of the regulation presents no issue which rises to the dignity of a Constitutional question. *Graves* v. *Minnesota,* 272 U.S. 425 (1926); *Walton* v. *City of Atlanta,* 181 F. 2d 693 (5 Cir., 1950), cert. den. 340 U.S. 823 (1950).

CONCLUSION

The petition for writ of certiorari should be denied.

June 10, 1974

Respectfully submitted,

JOHN G. DE ROOS
Attorney for Respondent

HELEN R. CASSIDY
JOHN A. MURRAY
of Counsel

Opinion of the United States District Court, Eastern District of New York in *Dwen* v. *Barry*

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

71 C 1020

THOMAS DWEN, as President of the Suffolk County Patrolmen's Benevolent Association and THOMAS DWEN, individually,

Plaintiff,

—against—

JOHN L. BARRY, Commissioner of the Suffolk County Police Department,

Defendant.

MEMORANDUM OF DECISION AND ORDER

May 30, 1974

In November, 1971, this court denied a preliminary injunction and dismissed a civil rights action brought by the plaintiff. The United States Court of Appeals for the Second Circuit, by order dated August 22, 1973, reversed this court's dismissal of the complaint and remanded the case for trial on the issue of whether the state had "... some legitimate state interest reasonably requiring the restriction on the individual." 483 F.2d 1126, 1130 (2d Cir. 1973). The appellate court held that the defendant had "... the burden of establishing a genuine public need for the regulation." 483 F.2d at 1131.

The regulations concerning grooming standards (originally numbered 2/75.0 to 2/75.5 of the rules and regulations of the Police Department, County of Suffolk, New York, dated July 19, 1971, effective August 1, 1971) have been modified and renumbered.[1] The complaint was amended to challenge the grooming standards set forth in Rule 2/2.16 as modified and in effect since November 15, 1973.

Defendant suggested that the grooming regulations serve the dual purpose of safety and morale. Defendant's sole witness was Deputy Commissioner Robert C. Rapp. Commissioner Rapp has been the Deputy Police Commissioner since July 21, 1973 and prior to that served as both a patrolman and a sergeant on the New York City police force and as an assistant district attorney of Suffolk County.

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[1] The regulations concerning hair, sideburns and mustaches are now numbered 2/2.16 subdivisions A, B and C. The regulations concerning beards, goatees and wigs are now subdivisions D and E of 2/2.16. As modified the grooming standards effective November 15, 1973 read as follows:

2/2.16 Members of the Force will be neat and clean at all times while on duty. Male personnel will comply with the following grooming standards unless excluded by the Police Commissioner due to special assignments:

A. Hair will be neat, clean, trimmed and present a groomed appearance. Hair will not go below the ears or the collar except the closely cut hair on the back of the neck. Pony tails are prohibited. In no case will the bulk or length of the hair interfere with the proper wear of any authorized headgear.

B. If a member chooses to wear sideburns, they will be neatly trimmed. Sideburns will not extend below the lowest part of the ear. Sideburns shall not be flared beyond 2" in width and will end with a clean-shaven horizontal line. Sideburns shall not connect with the mustache.

C. A neatly trimmed mustache may be worn.

Commissioner Rapp testified that long hair presents a safety problem to an officer attempting to make an arrest by placing that officer in a position of being thrown off balance by an offender. The Commissioner demonstrated that a downward force applied to the head through the grasp of "superfluous" hair and transmitted to the forearm in contact with the police officer's back could result in an embarrassing and potentially dangerous upending. The demonstration, favored by a bountiful head of hair supplied by the official court reporter on duty, served to illustrate that pony tails present a hazard to law enforcement officers and are a proper subject for regulation. The remainder of 2/2.16A, however, bears no relationship to safety but rather relates to hair styling.[2] The potential danger in hairdress is the ability of the offender to grip the hair and hold the fate of the police officer in his hand. Bulk and length of the hair is not regulated except as it interferes with "the proper wear of any authorized headgear." Thus the regulation would permit bulky and lengthy hair on the top of the head, thereby presenting the very problem that was demonstrated. In the remaining subdivisions, sideburns, mustaches and wigs are regulated and beards are barred. No proof was offered to support any claim of the need for the protection of the police officer in the pertinent regulations.

The high morale of police personnel is a matter of grave concern to the department. Proper grooming is an ingredient of the esprit de corps of a good law enforcement organization. The self-esteem generated in the individual and the respect commanded from the public it serves pro-

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[2] The purpose of Section 2/2.16A is stated in the first sentence:

"Hair will be neat, clean, trimmed, and present a groomed appearance." The remainder of the subdivision relates to specific standards of good grooming.

motes the efficiency of the organization's work. However, with the exception of the general requirement that hair, sideburns and mustaches be neatly trimmed, the regulations do not provide standards for proper grooming. Rather, the standards do nothing more than demand uniformity. Uniformity for uniformity's sake does not establish a public need.[3] Defendant offered no proof that beards, goatees, hair styles that extend below the ears or collar, or sideburns that extend below the lowest part of the ear or beyond 2" in width and do not end with a clean-shaven horizontal line affect the morale of the members of the police department or earn the disrespect of the public.

Defendant failed to establish a legitimate state interest requiring these restrictions on the members of the police department. Rule 2/2.16 including its subdivisions is an arbitrary limitation and a purposeless restraint. As such, it is violative of the Due Process Clause of the Fourteenth Amendment and therefore unconstitutional.[4]

Judgment is granted in favor of the plaintiff and against the defendant declaring Section 2/2.16 of the rules and procedures of the Suffolk County Police Department unconstitutional, void and of no effect and permanently enjoining the defendant from enforcing Section 2/2.16.

Settle judgment in accordance with this memorandum of opinion on two days service (five days by regular mail).

JACOB MISHLER
U.S.D.J.

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[3] Commissioner Rapp testified that uniformity was required for identification. It would appear, however, that the uniform (issued by the department) supplies the necessary identification for police work.

[4] Section 2/2.16 fixes grooming standards for male members only. The court does not reach the equal protection claim of the Fourteenth Amendment.